

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 ROANE HOLMAN, individually and on
5 behalf of all others similarly
6 situated,

No. C 11-0180 CW
ORDER DENYING
DEFENDANT EXPERIAN
INFORMATION
SOLUTIONS, INC.'S
MOTION TO DISMISS
(Docket No. 11)

7 Plaintiff,

8 v.

9 EXPERIAN INFORMATION SOLUTIONS, INC.;
and FINEX GROUP LLC,

10 Defendants.

11
12 Defendant Experian Information Solutions, Inc., moves to
13 dismiss Plaintiff Roane Holman's claim against it. Plaintiff
14 opposes the motion. Defendant Finex Group LLC has answered
15 Plaintiff's complaint, but joins Experian's motion. The motion
16 will be decided on the papers. Having considered the papers
17 submitted by the parties, the Court DENIES Experian's motion.

18 BACKGROUND

19 I. Allegations in This Case

20 This action arises from the alleged disclosure of Plaintiff's
21 credit report in violation of the Fair Credit Reporting Act (FCRA).

22 Plaintiff alleges that, on August 8, 2009, law enforcement
23 personnel directed Big Guys Towing to tow his car. Subsequently,
24 Plaintiff failed to pay Big Guys for the towing and storage of his
25 car. On August 31, 2009, Big Guys purportedly sold Plaintiff's car
26 and, thereafter, sought to recover from Plaintiff the difference
27 between his car's sale price and the amount he owed for Big Guys'
28 towing and storage services.

1 To collect Plaintiff's towing-related debt, Big Guys allegedly
2 retained Finex. On September 14, 2009 and pursuant to its
3 subscription with Experian, Finex purportedly obtained a copy of
4 Plaintiff's credit report.

5 Plaintiff brings a claim against Finex for a willful violation
6 of the FCRA, 15 U.S.C. § 1681n. He asserts that Finex violated the
7 FCRA by obtaining a consumer credit report without a permissible
8 purpose. He also charges Experian with a willful violation of the
9 FCRA, alleging that it furnished his credit report in the absence
10 of a permissible purpose.

11 II. Appeal in Pintos v. Pacific Creditors Association

12 In Pintos v. Pacific Creditors Association, Case No. C 03-5471
13 CW (N.D. Cal.), this Court granted summary judgment in favor of the
14 defendants, Pacific Creditors Association (PCA) and Experian,
15 concluding that it was permissible to furnish Maria Pintos's credit
16 report for the purpose of collecting her towing-related debt.
17 Experian had maintained that this purpose fell within the scope of
18 15 U.S.C. § 1681b(a)(3)(A), which authorizes a consumer reporting
19 agency to furnish a consumer credit report to a person it has
20 reason to believe "intends to use the information in connection
21 with a credit transaction involving the consumer on whom the
22 information is to be furnished and involving the extension of
23 credit to, or review or collection of an account of, the consumer."
24 Pintos appealed. While the alleged events in the current case
25 occurred, proceedings on Pintos's appeal were ongoing.

26 The Pintos appeal generated two opinions by the Ninth Circuit.
27 In the first, issued September 21, 2007, the Ninth Circuit
28 concluded that the Fair and Accurate Credit Transactions Act of

1 2003 (FACTA), Pub. L. No. 108-159, 117 Stat. 1952, amended the FCRA
2 to define "credit" as a "'right . . . to defer payment,'" and, as a
3 result, a "'credit transaction' is a transaction in which the
4 consumer directly participates and voluntarily seeks credit."
5 Pintos v. Pac. Creditors Ass'n, 504 F.3d 792, 798 (9th Cir. 2007)
6 (citing Stergiopoulos v. First Midwest Bancorp, Inc., 427 F.3d
7 1043, 1047 (7th Cir. 2005)). On April 30, 2009, the Ninth Circuit
8 withdrew this opinion and issued a superseding decision. The
9 second Pintos opinion excised the previous references to the FACTA,
10 but reached the same conclusion: collection of a towing-related
11 debt did not provide a permissible purpose to obtain or furnish a
12 credit report because it did not constitute "a transaction
13 initiated by [the consumer]." Pintos v. Pac. Creditors Ass'n, 565
14 F.3d 1106, 1114 (9th Cir. 2009). Experian petitioned for rehearing
15 en banc, which was denied; seven circuit judges dissented from the
16 denial. See generally Pintos v. Pac. Creditors Ass'n, 605 F.3d
17 665, 670-72 (9th Cir. 2010). Following the denial of Experian's
18 petition, on May 21, 2010, the Ninth Circuit panel amended the
19 second Pintos opinion to clarify what arguments Experian and
20 Pacific Creditors Association could raise on remand to this Court.
21 Id. at 670. This amendment did not alter the analysis or holding
22 of the April 2009 opinion. Id.

23 On June 1, 2010, the mandate in Pintos issued. On January 10,
24 2011, the United States Supreme Court denied Experian's petition
25 for a writ of certiorari.

26 LEGAL STANDARD

27 A complaint must contain a "short and plain statement of the
28 claim showing that the pleader is entitled to relief." Fed. R.

1 Civ. P. 8(a). When considering a motion to dismiss under Rule
2 12(b)(6) for failure to state a claim, dismissal is appropriate
3 only when the complaint does not give the defendant fair notice of
4 a legally cognizable claim and the grounds on which it rests.
5 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
6 considering whether the complaint is sufficient to state a claim,
7 the court will take all material allegations as true and construe
8 them in the light most favorable to the plaintiff. NL Indus., Inc.
9 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
10 principle is inapplicable to legal conclusions; "threadbare
11 recitals of the elements of a cause of action, supported by mere
12 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
13 ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550
14 U.S. at 555).

15 DISCUSSION

16 Experian asserts that, in September 2009, no authority clearly
17 established that it was impermissible under the FCRA to furnish
18 consumer credit reports for use in the collection of towing-related
19 debts. Instead, Experian asserts, it was an open question whether
20 section 1681b(a)(3)(A) permitted it to furnish Plaintiff's credit
21 report to recover his towing-related debt. Thus, Experian argues,
22 Plaintiff cannot state a claim for a willful violation of the FCRA.

23 The FCRA limits the purposes for which consumer reporting
24 agencies may disclose credit reports. 15 U.S.C. § 1681b. For
25 willful violations of the statute, prevailing consumers may recover
26 actual or statutory damages, punitive damages and reasonable
27 attorneys' fees. 15 U.S.C. § 1681n(a).

28 To prove a willful violation, a consumer must show that the

1 defendant violated the FCRA either knowingly or recklessly. Safeco
2 Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007). A defendant's
3 action is considered reckless if it "is not only a violation under
4 a reasonable reading of the statute's terms, but shows that the
5 company ran a risk of violating the law substantially greater than
6 the risk associated with a reading that was merely careless." Id.
7 at 69. A defendant that violates the FCRA based on an erroneous,
8 but objectively reasonable, reading of the statute does not act
9 recklessly. Id. To determine whether a defendant's reading was
10 objectively reasonable, courts may consider the text of the Act or
11 "guidance from the courts of appeal or the Federal Trade
12 Commission." Id. at 70.

13 As noted above, in April 2009, the Ninth Circuit issued its
14 second opinion in Pintos, which indicated that the collection of a
15 towing-related debt did not constitute a permissible purpose for
16 furnishing a credit report under the FCRA. Although that opinion
17 was subject to Experian's petitions for rehearing en banc and for a
18 writ of certiorari in the United States Supreme Court, the April
19 2009 opinion was "nevertheless final for such purposes as stare
20 decisis, and full faith and credit." Wedbush, Noble, Cooke, Inc.
21 v. SEC, 714 F.2d 923, 924 (9th Cir. 1983). Indeed, the April 2009
22 Pintos opinion was preceded by the Seventh Circuit's 2005 decision
23 in Stergiopolous. There, the Seventh Circuit stated,

24 An entity may rely on subparagraph (3)(A) only if the
25 consumer initiates the transaction. . . . [T]here must
26 be a direct link between a consumer's search for credit
27 and the bank's credit report request. If the connection
between a consumer's search and a bank's request is
clear, it is unlikely that the request will infringe the
consumer's privacy interests, for it will "involve" the
plaintiff directly.
28

1 427 F.3d at 1047 (citing Cole v. U.S. Capital, 389 F.3d 719, 725
2 (7th Cir. 2004)). Notwithstanding the April 2009 Pintos opinion or
3 the Seventh Circuit's 2005 decision in Stergiopoulos, Experian
4 apparently did not change its practices and, in September 2009,
5 allegedly disclosed Plaintiff's credit report to Finex for the
6 purpose of collecting a towing-related debt, even though Plaintiff
7 did not initiate the transaction. Against this background,
8 Experian may have run "a risk of violating the law substantially
9 greater than the risk associated with a reading that was merely
10 careless." Safeco, 551 U.S. at 57. Thus, Plaintiff states a claim
11 against Experian for a willful violation of the FCRA.

12 Experian insists that, because the Supreme Court did not deny
13 its petition for a writ of certiorari until January 2011, the use
14 of credit reports to collect towing-related debts was still
15 debatable in September 2009. However, Wedbush clearly provides
16 that, once precedential decisions are published, they are binding
17 for the purposes of stare decisis. The April 2009 Pintos decision
18 indicated that Experian's practices were unlawful. Experian cites
19 Carver v. Lehman, 558 F.3d 869 (9th Cir. 2009), to argue that,
20 until the appellate court's mandate issues, a decision is not
21 final. In Carver, the majority believed it was necessary to
22 respond to its "concurring colleague's pre ambular observations
23 about the processing of this case." Id. at 878. In its response,
24 the majority discussed the procedure by which litigants may seek
25 review of a panel decision prior to the issuance of the mandate.
26 Id. at 878-79. This discussion did not silently overrule Wedbush,
27 nor could it. See, e.g., Kotrous v. Goss-Jewett Co. of N. Cal.,
28 523 F.3d 924, 933-34 (9th Cir. 2010) (stating that three-judge

1 panel cannot overrule prior Ninth Circuit decision). Indeed, in
2 United States v. Ruiz, a case cited by Experian, the Ninth Circuit
3 observed that panel decisions are valid, pending decisions on
4 petitions for rehearing en banc. 935 F.2d 1033, 1037 (9th Cir.
5 1991).¹ Furthermore, in addition to the April 2009 Pintos
6 decision, the Seventh Circuit concluded in 2005 that, under section
7 1681b(a)(3)(A), a consumer's credit report may be furnished only if
8 the consumer initiated the transaction. The April 2009 Pintos
9 decision and the Seventh Circuit's decision in Stergiopoulos
10 demonstrate that Experian was not operating with a blank slate when
11 it furnished Plaintiff's credit report in September 2009.

12 Accordingly, Experian's motion to dismiss must be denied.

13 CONCLUSION

14 For the foregoing reasons, the Court DENIES Experian's motion
15 to dismiss Plaintiff's claim for a willful violation of the FCRA.
16 (Docket No. 11.) Experian shall answer Plaintiff's complaint
17 within fourteen days of the date of this Order. Fed. R. Civ. P.
18 12(a)(4)(A).

19 The case management conference will be held as scheduled on
20 May 26, 2011 at 2:00 p.m.

21 IT IS SO ORDERED.

22
23 Dated: 5/25/2011


Claudia Wilken

24 CLAUDIA WILKEN
United States District Judge

25
26 ¹ The court suggested that relying on a decision subject to a
27 petition for rehearing could be a "gamble" that might not "pay off"
28 because the decision might be later withdrawn or vacated. Ruiz,
935 F.2d at 1037. This statement, however, does not suggest that
the decision lacks precedential value.